ORIGINAL

No. 93-8040

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

FRANK BASIL McFARLAND,
Petitioner,

v.

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In view of both equitable principles governing habeas corpus and Congress' creation of a mandatory right to counsel in 21 U.S.C. § 848(q)(4)(B), did the district court err by applying the traditional *Barefoot* standard governing stays of execution to McFarland, a death-sentenced habeas petitioner who filed a skeletal habeas petition solely to invoke the district court's jurisdiction to grant a stay in order to appoint counsel.

2. (a) Did the court of appeals err by dismissing McFarland's appeal as moot.

   (b) Even if McFarland's appeal is otherwise moot, is the larger issue raised on appeal nevertheless justifiable because it is "capable of repetition yet evading review"?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Respondent Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division,[1] by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dismissing the appeal as moot is attached to the petition as Appendix A. *McFarland v. Collins*, 8 F.3d 47 (5th Cir. 1993). The opinion of the United States District Court for the Northern District of Texas, Fort Worth Division, is attached to the petition as Appendix B.

[1] For clarity, the petitioner is referred to as "McFarland" and the respondent as "the Director".

STATEMENT OF JURISDICTION

McFarland seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254. Nonetheless, because the courts below did not grant McFarland a certificate of probable cause to appeal but rather dismissed his appeal as moot, this case never was "in" the court of appeals for purposes of appeal under § 1254. As set forth *infra*, there is no jurisdiction pursuant to the All Writs Act, codified at 28 U.S.C. § 1651.

CONSTITUTIONAL PROVISIONS INVOLVED

McFarland bases his claims upon 28 U.S.C. § 2251 and 21 U.S.C. § 848 (q) (4) (B).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The Director has lawful custody of McFarland pursuant to a judgment and sentence of Criminal Court Number 3, Tarrant County, Texas. McFarland was indicted on March 23, 1988 in Cause Number 0336837D for the capital murder of Terry Hokanson in the course of committing aggravated sexual assault. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 1991). McFarland entered a plea of "not guilty" to the indictment. Trial on the merits commenced on October 26, 1989, and on November 13, 1989, the jury returned a verdict of guilty as charged in the indictment. Following a separate hearing on punishment, the same jury affirmatively answered two special issues submitted to it pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure. Thereafter, the trial court sentenced McFarland to death by lethal injection.

McFarland's case was automatically appealed to the Texas Court of Criminal Appeals, which affirmed his conviction and sentence on September 23, 1992. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). Rehearing was denied on December 9, 1992. The Texas Appellate Practice and Education Resource Center (hereinafter "the Center") withdrew records of McFarland's trial and appeal from the Court of Criminal Appeals on January 19, 1993, and returned them on January 25, 1993. JA 98.

On March 9, 1993, Isaiah Gant of Nashville, Tennessee, an attorney recruited by the Center, filed a petition for writ of certiorari, which was denied on June 6, 1993. *McFarland v. Texas*, 113 S.Ct. 2937 (1993). More than two months later, on August 16, 1993, the state trial judge, Judge Leonard, entered an order scheduling McFarland's execution for September 23, 1993. JA 3-5. By letter dated September 19, 1993, Eden Harrington of the Center asked Judge Leonard to withdraw McFarland's scheduled execution date because it would take "at least 120 days" to locate new counsel for McFarland, and recruited or appointed counsel should be allowed at least an additional 120 days to prepare the state habeas application. JA 6-10. The following day, the trial court ordered the modification of McFarland's execution date to October 27, 1993. JA 12.

Judge Leonard received a second letter and proposed order from the Center, dated October 16, 1993. In the letter, the Center stated that it still had not secured counsel for McFarland and again asked the court to withdraw the execution date. JA 16-19. On October 21, 1993, with the assistance of the Center, McFarland filed a *pro se* application for stay of execution and motion for appointment of counsel in the Court of Criminal Appeals. JA 21-23. Neither the stay application nor the motion for appointment of counsel was presented to the trial court. JA 89-90. The Court of Criminal Appeals denied the application for stay and the motion on Friday, October 22, 1993. JA 40. McFarland challenged the denial of the stay and appointment of counsel in a petition for writ of certiorari, which was denied on November 29, 1993. *McFarland v. Texas*, 114 S.Ct. 575 (1993).

The same day, with the assistance of the Center, McFarland filed *pro se* a motion for stay of execution and for appointment of counsel in the United States District Court for the Northern District of Texas, Fort Worth Division, docketed as No. 4:93-CV-714-A. JA 41-45. No federal habeas corpus petition was filed. On October 25, 1993, the district court denied a stay of execution because McFarland had not invoked its jurisdiction by

filing a federal habeas petition. JA 76-78. On October 26th, the district court struck from the record McFarland's application for a certificate of probable cause to appeal (CPC), because the action did not represent an habeas proceeding. JA 79-80. The United States Court of Appeals for the Fifth Circuit denied CPC and a stay at approximately 6 p.m. the same day. JA 85-88, *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993). The Court then granted McFarland's subsequent application for stay of execution, *McFarland v. Collins*, 114 S.Ct. 374 (1994), and , on November 29, 1993, granted the petition for writ of certiorari limited to question 2 presented by the petition. *McFarland v. Collins*, 114 S.Ct. 544 (1994).

At approximately 6 p.m. on October 26th, McFarland filed a motion for appointment of counsel and stay of execution and a federal petition for writ of habeas corpus, No. 4:93-CV-723-A, in which he raised one ground for relief. In an order that addressed the merits of McFarland's claim, the district court denied a stay of execution. McFarland's subsequent motion for leave to file an amended habeas petition did not include any additional grounds for relief and was denied by the district court at approximately 8:30 p.m. CPC was denied by the district court at 10:17 p.m. A motion for stay of execution was thereafter granted by the Fifth Circuit at approximately 11:50 p.m. On October 28th, McFarland filed in the district court a notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a). McFarland's appeal subsequently was dismissed as moot and the stay lifted. *McFarland v. Collins*, 8 F.3d 256 (5th Cir. 1993).

B. Statement of Facts

The Court of Criminal Appeals found the following facts:

> Viewed in the light most favorable to the verdict, the evidence at trial established the following facts. On the afternoon of February 1, 1988, the victim went to work at a bar in Arlington. Appellant and a friend of his, Michael Ryan Wilson, were also at the club on this day. At some point in the afternoon, the two men had a drink sent over to the victim. Later, a waitress introduced the victim to the

two men. Appellant, Wilson, the victim, and a waitress made plans to go to another bar together later that evening, although the waitress canceled her part of the arrangement.

Around 7:00 p.m. or 8:00 p.m. that evening, the victim went home to change and eat dinner before going out. Several employees of the second bar remember seeing a woman, who fit the description of the victim, arrive alone between 8:00 p.m. and 9:00 p.m. They also recalled her leaving shortly thereafter with two men. Her car was found in the parking lot the next morning.

Approximately 10:00 p.m. or 11:00 p.m. that evening, three teenage boys were walking by a public park when they heard a scream. One stood on a nearby bench to look for the police and saw a car driving away. As the boys continued walking, they noticed someone stumbling in a "kind of drunk manner." As they got closer to the figure, they realized the figure was a woman. When they reached her, they noticed that she had blood on her face. One of the boys asked if she needed help, to which she replied that she did. The other boy immediately ran to the nearest house to call for help. The victim told the boys that she had been sexually assaulted and stabbed.

While the one boy was away, a police officer happened upon the scene. The boys told the officer that the victim said that she had been sexually assaulted and stabbed. As the officer approached the victim, he could see that she had blood on her face, jacket, and shirt, and her hand was cut to the bone. The officer tried to question the victim as much as possible. The victim told him that "[t]hey raped and stabbed me." The officer elicited further information that the two assailants were white men and that the victim had met them at the club where she worked. The officer could not later remember the name of the club, but he was subsequently placed under hypnosis, at which time that information was elicited. When the paramedics arrived, the victim also told them that she had been sexually assaulted and stabbed. The victim died about 3:00 a.m.

A search of the area where the victim was found turned up her purse, shoes, watch, and one earring in a pool of blood at the top of the hill. Additionally, a five hundred foot trail of blood led from where the victim's belongings were found to where she had been discovered. An autopsy

revealed that the victim had been stabbed by at least two different types of knives and knife-like weapons. The examination also revealed evidence of sexual intercourse, but was inconclusive as to whether the victim had been sexually assaulted.

At trial, Wilson's girlfriend, Rachael Revill, testified that on the night in question, appellant and Wilson arrived at her apartment. They had left the apartment together in appellant's car earlier that evening and were not returning together. Revill noticed that Wilson's pants appeared to be stained with blood and appellant appeared to have a gash on his hand. After Wilson showered, changed, and gathered his blood-stained clothing, the two men again left. Wilson returned about fifteen minutes later without appellant. Revill said Wilson was surrounded by a "burning odor." Wilson later told his girlfriend that he had burned his clothes because they had blood on them. He also explained that he and appellant had "had to get rid of a girl" because she knew too much about their drug business. Wilson insisted that appellant had actually killed the victim.

At a later time, appellant again picked Wilson up from Revill's apartment and they went to the club where the victim had worked on the day she was killed. Appellant asked a waitress if any detectives had asked anything about him or Wilson. The waitress observed scratch marks down appellant's cheek. Subsequently, Wilson contacted an acquaintance of his and appellant's, Mark Noblett. He told Noblett that he and appellant had been to a club with the victim and that later, appellant sexually assaulted and stabbed the victim. Wilson also told Noblett that he was afraid of appellant and wanted Noblett to approach the police on his behalf. The two men agreed to meet the next day, but Wilson never showed.

On March 11, 1988, Wilson was found dead in Weatherford. Four days later, Revill contacted the police and told them of Wilson's confession to her on the night of the victim's murder. Warrants were then issued to obtain blood, saliva, and hair samples from appellant and to impound and search his automobile. The search of appellant's vehicle uncovered hairs which proved to be microscopically similar to those found in a rabbit coat of the type that the victim was wearing the night she was killed. A scarf was also discovered on which was found a pubic hair

> microscopically similar to the victim's. Finally, the police recovered an earring which was not distinguishable from the earring found at the scene of the murder. A DNA analysis of the semen recovered from the victim's body and found on her clothes did not eliminate appellant as a donor, although it did conclusively establish that, if Wilson was a donor, he was not the sole donor.

McFarland v. State, 845 S.W.2d 824, 828-300 (Tex. Crim. App. 1992).

ARGUMENT

I.

THE ISSUE PRESENTED BY McFARLAND IN THIS PETITION WILL BE RESOLVED BY THE COURT IN *McFARLAND V. COLLINS*.

This case is controlled by and should be held pending the Court's disposition of the issue before it in *McFarland*. McFarland argues here that a perfunctory petition, filed to assure the district court's jurisdiction to enter a stay and appoint counsel under 21 U.S.C. § 848 (q), should not be subject to the *Barefoot v. Estelle*, 463 U.S. 880 (1983), standard for stays of executions, which requires the petitioner to make a substantial showing of the denial of a federal right. *Id.* at 893. Although 21 U.S.C. § 848 (q) was not identified in the issue upon which certiorari review was granted in *McFarland v. Collins*, 114 S.Ct. 544 (1994),[2] both the briefing and argument before the Court make it clear that the issue raised in the instant petition is subsumed in the issue before the Court in that case. If the Court decides that the *Barefoot* standard is applicable to death-sentenced inmates for whom counsel has not yet been appointed pursuant to 848 (q) and who have not yet filed

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[2] Certiorari review was granted to decide the following issue:

> Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or 28 U.S.C. § 1651 (a), in order to appoint counsel for an indigent *pro se* death row inmate who has not yet filed a habeas corpus petition but who has expressed an intention to file a petition once counsel is obtained?

a habeas petition, then the *Barefoot* standard will surely be applicable to a death sentenced inmate who has filed a petition identifying grounds for relief. Conversely, if the Court decides that the *Barefoot* standard is inapplicable under the circumstance before the Court in *McFarland*, it should correspondingly be inapplicable where a perfunctory petition is filed only to endow the district court with jurisdiction to appoint counsel pursuant to 848 (q) and to stay the execution to allow for the filing of a federal habeas petition. Further, the circumstances delineated by McFarland in this case are not capable of repetition because his rights under the circumstances will be determined by the Court's resolution of *McFarland*.

For the reasons briefed and argued on behalf of the Director in *McFarland*, the district court correctly applied the *Barefoot* standard to deny McFarland a stay based on his second habeas petition, and, following McFarland's voluntary dismissal of the district court action, the Court of Appeals correctly dismissed the appeal of the denial of a stay and appointment of counsel as moot.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that McFarland's petition for writ of certiorari be denied.

Respectfully submitted,

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June 6, 1994

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Frank Basil McFarland v. Wayne Scott*, No. 93-8040

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

Margaret Portman Griffey

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MPG/skw
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PROOF OF SERVICE

I hereby certify that on the 6th day of June, 1994, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Mandy Welch and Brent Newton, Texas Resource Center, 3223 Smith St., Suite 215, Houston, Texas, 77006. All parties required to be served have been served. I am a member of the Bar of this Court.

Margaret Portman Griffey

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